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No. 82-1777

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN LESTER HARRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioners' Sixth Amendment claim of ineffective assistance of counsel on the ground that the record revealed no actual conflict of interest and no adverse effect on their counsel's performance at trial.

2. Whether there was sufficient evidence from which the jury could conclude that a farm worker's death was the proximate result of the illegal conduct of petitioners Harris and Dennis Warren.

3. Whether there was sufficient evidence from which the jury could conclude that petitioner Harris aided and abetted petitioner Dennis Warren in holding farm worker Craig Connors to involuntary servitude in violation of 18 U.S.C. 2 and 1584.

4. Whether the court of appeals correctly reinstated petitioner Richard Warren's conviction under 18 U.S.C. 241.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-59) is reported at 701 F.2d 1095. The opinion of the district court entering a judgment of acquittal for petitioner Richard Warren on the charge of violating 18 U.S.C. 241 (Pet. App. 60-76) is reported at 535 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. The petition for a writ of certiorari was filed on April 29, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions, 18 U.S.C. 2, 241, and 1584, are reproduced at Pet. 9-10.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of violating various civil rights statutes in connection with their supervision of a crew of migrant farm workers in Nash County, North Carolina, in the summer of 1981 (Pet. App. 37). Petitioners Harris and Dennis Warren were convicted of conspiracy resulting in the death of one Robert Anderson, a farm worker, in violation of 18 U.S.C. 241 (Pet. App. 35). Petitioner Richard Warren was convicted of the lesser included offense of conspiracy without death resulting, in violation of 18 U.S.C. 241 (Pet. App. 35). In addition, all three petitioners were convicted of holding worker Harvey Rutherford to involuntary servitude, in violation of 18 U.S.C. 1584 (Pet. App. 35-36); Harris and Dennis Warren were convicted of holding worker Craig Connors to involuntary servitude, in violation of 18 U.S.C. 2 and 1584 (Pet. App. 36); and Harris was convicted of kidnapping worker Joseph Simes with intent to hold him as a slave, in violation of 18 U.S.C. 1583 (Pet. App. 36 n.3).[1]

Following the imposition of sentence on petitioner Richard Warren, the district court granted his motion for a judgment of acquittal on the Section 241 conspiracy charge on the ground that the jury's conviction of Richard Warren

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[1]Petitioner Harris received a life sentence on the conspiracy conviction and five years on each of the three substantive offenses, to be served consecutively to each other and to the life sentence. Petitioner Dennis Warren received a 20-year sentence on the conspiracy conviction and five years on each of the two substantive offenses, to be served concurrently to each other and to the 20-year sentence. Petitioner Richard Warren received concurrent five-year sentences on the conspiracy charge and the substantive offense, with all but six months suspended, and was placed on five years' probation. See Pet. App. 62.

of conspiracy without death resulting appeared to be inconsistent with its conviction of petitioners Harris and Dennis Warren of the same conspiracy resulting in death (Pet. App. 60-76).

The court of appeals affirmed all of the convictions (Pet. App. 32-59). In addition, it reversed the judgment of acquittal of Richard Warren on the Section 241 charge and reinstated the jury's verdict on that charge. The court rejected petitioners' contentions that they had not received effective assistance of counsel, since the record showed neither an actual conflict of interest nor an adverse effect on the performance of the attorney for the Warrens (Pet. App. 39-44). The court found (*id.* at 44-47) that there was sufficient evidence to support the convictions for holding farm workers to involuntary servitude in violation of 18 U.S.C. 2 and 1584. It also concluded (Pet. App. 47-51) that there was ample evidence to support the jury's conclusion that the death of Robert Anderson was proximately caused by the unlawful conduct of Harris and Dennis Warren. Finally, the court concluded (*id.* at 51-57) that the apparently inconsistent verdict against petitioner Richard Warren for conspiracy not resulting in death was "a legally unassailable product of jury lenity" (*id.* at 55) and should not have been dismissed.

ARGUMENT

The court of appeals correctly applied settled legal principles to the facts of this case. Its decision does not conflict with any decision of this Court or any other court of appeals. Thus, further review is not warranted.

1. Petitioners first contend (Pet. 14-20) that the court of appeals' rejection of their Sixth Amendment claim based on an alleged conflict of interest on the part of counsel for the Warrens conflicts with decisions of this Court, particularly *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). That contention is without merit. The court of appeals correctly applied the

appropriate legal standard in concluding that the record reveals neither an actual conflict of interest nor an adverse effect on the performance of the Warrens' counsel.

The alleged conflict came to light when the United States filed a pretrial motion revealing that the lawyer serving as defense counsel for the Warrens was a member of the law firm that represented Cecil Williams, the owner of the farm where the crimes occurred, and a potential government witness (Pet. App. 39).[2] A federal magistrate conducted a hearing on the government's motion (which also raised the question of the joint representation of Dennis and Richard Warren by the same firm). However, no transcript of the hearing was made, and neither the magistrate nor counsel could recall any separate inquiry concerning the "conflict" about which petitioners now complain (*id.* at 40). In any event, the record is clear that petitioners had notice prior to trial of the firm's representation of both the Warrens and the farm owner, and that they failed to object to it.[3]

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[2]The government's motion requested a "Garcia hearing" (see *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975)) to determine whether the Warren brothers were aware of any actual or potential conflict of interest in their joint representation by the same law firm or in that firm's representation of farm owner Cecil Williams. Williams had testified before the grand jury and was later called as a government witness at trial.

Petitioner Harris had independent counsel (Pet. App. 40 n.8). However, in the court of appeals he argued that he was denied effective assistance of counsel because his trial counsel was assigned at the last minute and "took a back seat" to counsel for the Warrens (*ibid.*).

[3]As discussed below, defendants who fail to object at trial to joint representation bear the burden of demonstrating the existence of an actual conflict of interest adversely affecting defense counsel's performance. Petitioners seek to escape that requirement by claiming that "a timely objection" was made below (Pet. 16-17). However, the record reveals no such challenge. The government did not object to the joint representation; its motion merely directed the attention of the court and the petitioners to its existence. Although petitioners were thus made fully aware of the joint representation, they failed to object to it.

In *Cuyler* v. *Sullivan, supra,* 446 U.S. at 348 (footnote omitted), this Court held that

> [i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

The court of appeals applied that standard here and concluded that petitioners had demonstrated neither an actual conflict nor an adverse effect (Pet. App. 42-44). The court correctly noted that the existence of a conflict depended on whether the farm owner himself faced a significant risk of being implicated in criminal conduct, but found that the record showed no such risk here (*id.* at 42). There was no evidence of direct involvement by the farm owner in supervision of the migrant workers; except for one comment held inadmissible by the trial court, there was nothing to indicate that the owner ever instructed petitioners on how to manage the workers (*ibid.*). Moreover, the farm owner never invoked his Fifth Amendment privilege before the grand jury or at trial (*id.* at 42 n.9).[4]

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[4]Petitioners err in interpreting this Court's decision in *Wood* v. *Georgia,* 450 U.S. 261 (1981), as prohibiting *any* joint representation of an employer and an employee (Pet. 18-19). *Wood* was an obscenity prosecution in which a movie theater and bookstore owner, who was himself vulnerable to criminal charges, retained and compensated counsel for his employees, who were charged with the offense. The employer agreed to pay the fines assessed against the employees, payment of which was a condition of their probation, but then refused to do so, resulting in revocation of probation. 450 U.S. at 264-266. The potential conflict in *Wood* stemmed from the possible criminal liability of the employer, his payment of the expenses of representation of the employees, and the conduct of the employees' defense in a manner that appeared to advance the theater owner's interest (by creating a constitutional test case) at the employees' expense (by having their probation revoked).

Wood is clearly distinguishable from this case. Here the Warrens, not the farm owner, retained and paid the law firm. Petitioners allege no

The court of appeals also concluded that, even if there had been a conflict, petitioners had shown no adverse effect on their defense (Pet. App. 42-44). Defense counsel vigorously cross-examined the farm owner concerning his dealings with the migrant workers until the trial court ruled that his questions exceeded the scope of direct examination (*id.* at 43). Defense counsel's decision not to call the farm owner for the defense was, in the court of appeals' judgment, a tactical determination to base a defense on the perceived shortcomings of the government's proof rather than on an affirmative defense (*ibid.*).[5] The court of appeals concluded that the record did not reveal "that counsel's performance was other than deliberate, objective strategy unaffected by any adverse interest of [the farm owner]" (*id.* at 43 n.10), and petitioners do not challenge this conclusion.[6]

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financial relationship binding the firm to the farm owner in a manner that would have affected the firm's handling of their defense. Unlike the situation in *Wood*, the farm owner had nothing to gain from petitioners' convictions. On the contrary, in view of the likely adverse public reaction if migrant crew supervisors hired by the farm owner were convicted of criminal civil rights violations, it presumably was in the farm owner's interest for petitioners to be acquitted.

[5]As the court of appeals noted (Pet. App. 43 n.10), the strategy employed by petitioners' counsel was partially successful. Petitioners Harris and Dennis Warren were both acquitted on one count of holding a farm worker to involuntary servitude, and the court dismissed another count before the case went to the jury.

[6]The court of appeals noted (Pet. App. 44 n.11) that it was not foreclosing the possibility that petitioners could file a motion under 28 U.S.C. 2255 and show actual conflict and adverse effect following further development of the record. A number of courts of appeals have held that a claim of ineffective assistance of counsel that is not raised at the trial stage may not be raised on direct appeal, but must be raised by means of a Section 2255 motion, so that an appropriate record can be made. See *United States* v. *Frankenberry*, 696 F.2d 239, 241-242 (3d Cir. 1982), petition for cert. pending, No. 82-6301; *United States* v. *Sturm*, 671 F.2d 749, 750-751 (3d Cir. 1982), cert. denied, No. 81-6689 (Oct. 4, 1982); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, No. 81-6716 (Oct. 4, 1982); *United States* v. *Hendricks*, 661 F.2d 38, 43 (5th Cir. 1981); *United States* v. *Lang*, 644 F.2d 1232, 1240 (7th Cir.), cert. denied, 454 U.S. 870 (1981).

2. Petitioners Harris and Dennis Warren contend (Pet. 20-25) that they should not be subjected to the enhanced punishment that can be imposed under 18 U.S.C. 241 in cases in which conspiracy results in death. They suggest that the court of appeals' ruling on this point conflicts with decisions of the Second and Fifth Circuits. That contention lacks merit.

Petitioners do not suggest that the trial court failed to follow the rule set out in *United States* v. *Guillette*, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977), and *United States* v. *Hayes*, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979), in instructing the jury concerning the "resulting in death" element. In *Guillette* and *Hayes* the courts concluded that the evidence in those cases established that the defendants' conduct satisfied the "resulting in death" element of 18 U.S.C. 241 or 242. In both cases, the court concluded that the government need not show that the defendants intended or directly caused the victim's death, but instead could prove that death occurred as the proximate result of, *i.e.*, that it was foreseeable and naturally resulted from, defendants' conduct. *United States* v. *Guillette, supra*, 547 F.2d at 748-750; *United States* v. *Hayes, supra*, 589 F.2d at 821-822. The trial court here instructed the jury in these terms, and petitioners did not object to that instruction.

Petitioners contend (Pet. 25) that their actions did not involve the sort of conduct that poses the risk of serious bodily injury or death that was required in the *Guillette* and *Hayes* cases. However, the court of appeals, citing the standard set out in the two cases (Pet. App. 48-49), concluded that the evidence, viewed in the light most favorable to the government,[7] fully supported the jury's conclusion

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[7]See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

that Robert Anderson's death was the foreseeable and proximate result of petitioners' conduct (*id.* at 49-50). That evidence showed that petitioners knew from their own observations and from the reports of others that (1) Anderson looked ill throughout his entire time in the camp;[8] (2) he had difficulty working; (3) he had vomited repeatedly prior to his death; (4) he had told petitioners he was sick and could not work; and (5) he had asked them for a doctor or for medicine. Petitioners' response to this information was to force Anderson (not only by ordering him verbally, but also by grabbing him and hitting him with a stick) to continue to work in the field in the heat until he collapsed. Despite Anderson's requests, petitioner Harris refused to summon medical help until it was too late (Pet. App. 49).

Reduced to its essentials, petitioners' claim is that the Court should review the jury's finding, affirmed by the district court (Pet. App. 63) and the court of appeals (*id.* at 47-50), that death was a foreseeable and natural result of holding Anderson to involuntary servitude. Review of that finding is not warranted. See *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), slip op. 10; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

3. Petitioner Harris contends (Pet. 25-27) that his conviction for aiding and abetting Dennis Warren in holding farm worker Craig Connors to involuntary servitude conflicts with *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949). No such conflict exists. Harris does not object to the jury instructions on the elements of aiding and abetting and of holding to involuntary servitude. In affirming his conviction, the court of appeals relied on the fact that the victim

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[8]In fact, Anderson apparently was wearing a hospital identification band on his wrist when he arrived at the camp several days before his death (Pet. App. 49).

Connors testified that he had seen Harris beat other workers and that Harris stood guard over the workers at night to prevent them from leaving. The court concluded that "[t]he combination of that guarding, which constituted personal involvement, with the beating of other workers" (Pet. App. 46) sufficed to make Harris an aider and abettor. That conclusion is fully consistent with this Court's statement in *Nye & Nissen* that in order to aid and abet commission of a crime, a defendant must participate in, or associate himself with, the criminal venture. 336 U.S. at 619.

4. Petitioner Richard Warren contends (Pet. 27-30) that the court of appeals misapplied *Dunn* v. *United States*, 284 U.S. 390 (1932), in reinstating his conviction for the lesser included offense of conspiracy without death resulting under 18 U.S.C. 241. The district court dismissed that charge because of what it viewed as an impermissible inconsistency with the convictions of Harris and Dennis Warren for conspiracy resulting in death (Pet. App. 60-76). However, the court of appeals' decision comports fully with *Dunn* and other decisions of this Court upholding the jury's power to return inconsistent verdicts in exercising lenity as to a particular defendant. See *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). See also *Standefer* v. *United States*, 447 U.S. 10, 22-23 (1980); *Harris* v. *Rivera*, 454 U.S. 339, 345-346 (1981).

The court of appeals recognized that the jury's verdict as to Richard Warren on the Section 241 charge was "in conflict with the evidence and applicable legal rules of vicarious guilt" (Pet. App. 55). However, it concluded that the verdict was nonetheless "a legally unassailable product of jury lenity" (*ibid.*). Petitioner urges (Pet. 28) that *Dunn* permits inconsistent verdicts on the basis of jury lenity only when the charges underlying the inconsistent verdicts, if tried separately, would not have res judicata effect as to each other. But assuming that interpretation of *Dunn* is

correct, the court of appeals' decision is consistent with it, since the court recognized that if the three petitioners had been indicted and tried separately on the Section 241 charge, the verdicts would have had no res judicata effect against the government (Pet. App. 57).[9] Thus, the reinstatement of petitioner Richard Warren's conviction under 18 U.S.C. 241 was entirely proper.

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[9]Contrary to petitioner Richard Warren's assertion (Pet. 29-30), the Fourth Circuit correctly analogized this case to *Standefer* v. *United States, supra,* in which this Court held that acquittal of the "principal" did not bar the conviction of the "aider and abettor" for the same offense in a separate trial. The Court noted in *Standefer* that a reason for not applying res judicata against the government in such a case is that a jury may act out of compassion or lenity in acquitting the principal. 447 U.S. at 22, 25.

The court of appeals cases cited by petitioner Richard Warren do not conflict with the ruling of the court below. In *United States* v. *Uzzolino,* 651 F.2d 207, 213 (3d Cir.), cert. denied, 454 U.S. 865 (1981), the court concluded that the verdicts in that case were logically consistent, noting that in any event "inconsistency alone is not an appropriate legal basis to reverse an otherwise valid jury verdict." In *United States* v. *Hannah,* 584 F.2d 27, 30 (3d Cir. 1978), the court recognized the "permissible inconsistent verdict rule" but declined to apply it because the government had tried the case on a very limited basis, relying on interdependence between the two counts at issue, so that acquittal on one count rendered the other count insufficient as a matter of law. Thus, the court concluded that in the circumstances of that case the counts could not be considered as if they had been brought in a separate indictment. *Fuller* v. *United States,* 407 F.2d 1199, 1223-1225 (D.C. Cir. 1968), cert. denied, 393 U.S. 1120 (1969), involved the propriety of instructing a jury on inconsistent charges and thus is not relevant to this case. In addition, it involved a conviction that could not have been the result of jury lenity. *Marquez-Anaya* v. *United States,* 319 F.2d 610 (5th Cir. 1963), involved defendants who were convicted of both smuggling narcotics and being the transferees of those narcotics. As in *Fuller,* the result could not have been explained as the result of jury lenity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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